IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

LISA HERDAHL, on behalf of herself
and her minor, school-age children,
Plaintiff

v. No. 3:94CV188-B-A

PONTOTOC COUNTY SCHOOL DISTRICT;
PONTOTOC COUNTY BOARD OF EDUCATION;
JOHN ALLEN, JOHN LAUDERDALE, JOHNNY
MOUNCE, KEN ROYE, and RICKY SPENCER,
in their official capacities as members
of the Pontotoc County Board of Education;
JERRY HORTON, in his official capacity
as Superintendent of the Pontotoc County
School District; STEVE CARR, in his
official capacity as Principal of North
Pontotoc Attendance Center; and RODNEY
FLOWERS, in his official capacity as
Assistant Principal of North Pontotoc
Attendance Center,
Defendants

MEMORANDUM OPINION

This cause is presently before the court on the defendants' motion for summary judgment. Plaintiff Lisa Herdahl is a resident taxpayer and mother of five children currently attending the North Pontotoc Attendance Center ("Center"), a public school located in Ecru, Mississippi. The Center provides public education from kindergarten through twelfth grade. The defendants seek the dismissal of the plaintiff's constitutional attack on the Bible course taught at the Center for lack of standing. Upon due consideration of the motion, the plaintiff's response thereto, the affidavits and memoranda submitted by the parties, the court is

prepared to rule. The following factual rendition, except where indicated, is not materially in dispute.

THE BIBLE CLASS

For the past 50 years, a committee in Pontotoc County comprised of local Protestant churches and commonly referred to as "the Bible Committee" has sponsored classes in which the Bible has been taught in the local public schools. Under this program, the Bible Committee selects and pays teachers who are allowed to conduct classes on school property during normal school hours. The Bible teachers do not have employment contracts with the Pontotoc County School District ("District"), and are the only teachers working in the school district who are not paid by the District. The District maintains that they have supervisory authority over the teachers. The District provides classroom space at the Center for the Bible class in all grades in which it is taught, as well as related materials such as bookshelves. In addition, the District provides public funds to the Bible teachers to be used for the purchase of books, supplies, and other materials to be used in the course, and such funds have been expended for such purpose.

Prior to the 1993/1994 school year, a course simply known as "Bible" was offered to the students at the Center. Prior to the plaintiff's enrollment of her children in the local public school, the Mississippi State Department of Education (MSDE) dropped the "Bible" class as an approved curriculum at the Center. In an effort to "preserve the integrity and essence of what they had been

teaching already," the Bible Committee developed a new curriculum entitled "A Biblical History of the Middle East."[1] They submitted a three-year pilot program for approval by the MSDE, which was granted. The Center began offering the approved curriculum for the 1993/1994 school year. This same curriculum is the basis for teaching all the grades at the Center, with the obvious exception that the teaching methods are adjusted to the level of the age group being taught. The District is currently awaiting final approval from the MSDE before the course can be taught for the 1996/1997 school year.

In the elementary grades at the Center (K - 6), the course is taught as a "rotational class," alternating once every four days with music, library, and physical education. The Bible teachers come into the students' regular classrooms and replace the regular teacher, who generally leaves the room. Although the other classes are mandatory, the District has made an exception for the Bible class. Students who do not wish to participate are excused and must get up in front of their classmates and leave the classroom. During this period, the only alternative instruction for them is to be sent to another "rotational class" for their grade, which merely duplicates a rotational class they have already taken or will take, so that the children end up taking the same class twice. The

[1]The court will refer to the course at issue in any of its subsequent forms as the "Bible class" and regardless of its official designation.

plaintiff's children who are subject to the District's rotational class program are now excused from participating in the Bible class and are escorted to and from another rotational class by the teacher or assistant. The plaintiff claims that being singled out in this manner has exposed and continues to expose her children to harassment and ridicule, and they have been accused of being atheists and devil worshippers.

The Bible class taught in the high school grades (9 - 12) is open to any student as a one-hour elective. Kevin Engle is the plaintiff's only child old enough and therefore eligible to attend the high school Bible class. Engle has not attended this class and indicated that he has no plans to do so in the future.

As a resident of Ecru, the plaintiff regularly purchases and has regularly purchased tangible personal property in the county and in the state on which she pays and has paid state sales taxes. The plaintiff has also paid ad valorem taxes to Pontotoc County on her motor vehicle since moving to Ecru. Public schools in Mississippi are funded in part by these taxes.

The defendants do not suggest here that their practice of allowing private organizations to operate and fund a course involving the teaching of the Bible serves to free the District from the constraints placed upon them by the Constitution. Indeed, such a position cannot be supported. Instead, they argue, however, that this practice in fact deprives the plaintiff of standing to

challenge the same. Thus, the court examines the plaintiff's standing to prosecute this claim.

STANDING

The United States Supreme Court has explained that "the term 'standing' subsumes a blend of constitutional requirements and prudential considerations . . . ." Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471, 102 S. Ct. 752, 758, 70 L. Ed. 2d 700 (1982) (citing Warth v. Seldin, 422 U.S. 490, 498, 95 S. Ct. 2197, 2205, 45 L. Ed. 2d 343 (1975)). Article III requires a party to show that she personally has suffered some actual or threatened injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision. Valley Forge, 454 U.S. at 474, 102 S. Ct. at 758. Beyond these constitutional requirements are a set of prudential principles: (1) the plaintiff generally must assert her own legal rights; (2) the court must refrain from adjudicating "generalized grievances" most appropriately addressed by one of the other branches of government; and (3) the plaintiff's complaint must fall within the zone of protected interests of the constitutional guarantee. Id. at 474-75, 102 S. Ct. at 759-60. In Valley Forge, the Court recognized that parents of school children have standing to sue if they are "directly affected by the laws and practices against which their complaints are directed." Id. at 486 n.22. Furthermore, such plaintiffs have standing "because

impressionable schoolchildren [are] subjected to unwelcome religious exercises or [are] forced to assume special burdens to avoid them." Id.

Taxpayer status by itself is normally not an injury sufficient to confer standing. Id. at 477. However, in Flast v. Cohen, 392 U.S. 83, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968), the Court created an exception to this general rule. If a taxpayer alleges injuries only by virtue of her liability for taxes, she will be a proper party to challenge the constitutionality of an exercise if it is predicated on the congressional power under the taxing and spending clause of the Constitution, as limited by the Establishment Clause. Id. at 102-03, 88 S. Ct. at 1942, 20 L. Ed. 2d at 947.

The Fifth Circuit recently explained that in order to establish state or municipal taxpayer standing to challenge an Establishment Clause violation, a party must (1) show that she pays taxes to the relevant entity and (2) show that tax revenues are expended on the disputed practice. Doe v. Duncanville Independent Sch. Dist., No. 94-10416, slip op. 1039, 1046 (5th Cir. Dec. 12, 1995). An examination of the relevant case law on the application of this issue will be instructive.

Any discussion in the area of constitutionally permissible religious instruction must begin with the seminal case of Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948). In McCollum, a plaintiff whose asserted

interest was described as a "resident and taxpayer of Champaign and of a parent whose child was then enrolled in the Champaign public schools," launched an attack on Illinois' "release time" program in its public schools. Id. at 205. A group of varied religious faiths formed a voluntary association called Council on Religious Education. They obtained permission from the Board of Education to offer classes in religious instruction in grades four to nine in the local public schools. Classes consisted of pupils whose parents signed cards requesting that their children be permitted to attend. The Council employed the religious teachers at no expense to the school authorities. The instructors were subject to the approval and supervision of the superintendent of the schools. The classes were taught by three separate religious groups, Protestant teachers, Catholic priests, and a Jewish rabbi. They were conducted in the regular classrooms of the school building. Students who did not choose to attend were not released from public school duties; they were required to go to some other place in the school building for pursuit of their secular studies. Tax-supported property for religious instruction was used and there was close cooperation between the school authorities and the Council in promoting religious education. The operation of the State's compulsory education system assisted the program. Id. at 207-09

In rebuking a challenge to the plaintiffs' standing, the Court summarily dismissed it as "without merit." Id. at 206. The Court went on to hold that the practice of the school showed:

> the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education. The operation of the State's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith.

Id. at 209-210 (emphasis added).

Four years later, the Supreme Court passed on another "release time" program. In Zorach v. Clauson, 343 U.S. 306, 72 S. Ct. 679, 96 L. Ed. 954 (1952), plaintiffs, who were residents and taxpayers of New York City and whose children attended its public schools, challenged the constitutionality of a program whereby students are released from the public schools during the school day on the written request of their parents to attend religious instruction classes or services at churches away from the school grounds. Those students who were not released remained in the classrooms and continued their secular education. The children of the plaintiff parents did not participate in the release program. The Court held that there was no jurisdictional problem posed in this case "since . . . [plaintiffs] here are parents of children currently attending

schools subject to the release time program." Id. at 309 n.4. Thus, the Court allowed a challenge to the schools' release program by plaintiffs whose only apparent interest was that of taxpayers and of parents of children who attended the public school (but did not participate in the questioned program). This case therefore probably establishes the "floor" on standing allowed by the Supreme Court.

A case even more closely analogous is Crockett v. Sorenson, 568 F. Supp. 1422 (W.D. Va. 1983). In Bristol, Virginia, the public school system provided a voluntary Bible class for fourth and fifth graders. The Bible class was sponsored by a private group of Protestant ministers who paid for the teachers. Only students who obtained written consent from their parents were entitled to enroll in the course. Students who did not enroll were sent to the principal's office or to the library during the Bible class period. Ninety-seven percent of the fourth and fifth graders took the class. The plaintiff's child was not among this majority.

The court, in determining that standing was proper, concisely summarized the basis as follows:

> Since Plaintiffs are residents and taxpayers of the City of Bristol, since their daughter was, at the time of the filing of this suit, in the fifth grade where the Bible instruction course is being taught, and since the complaint alleges that this program is constitutionally impermissible, they have the requisite standing to prosecute this action. See Abington School District v. Schempp, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963); McCollum v. Board of Education, 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948).

Crockett, 568 F. Supp. at 1424-25. Clearly, the plaintiffs in Crockett had no more standing to sue than Mrs. Herdahl does in the instant case.

More recently, in Doe v. Human, 725 F. Supp. 1503 (W.D. Ark. 1989), aff'd, 923 F.2d 857 (8th Cir. 1990), cert. denied, 499 U.S. 922 (1991), the court allowed a similar challenge to a voluntary Bible class taught in the public elementary schools in Gravette, Arkansas. The plaintiffs were parents of children who were excused from the class. In relying on McCollum, the court held that the voluntariness of the program is irrelevant to the constitutional question posed. Doe, 725 F. Supp. at 1505. See also School Dist. of Abington Township v. Schempp, 343 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963) (noting the fact that individual students may absent themselves upon parental request is no defense to a claim of unconstitutionality under the Establishment Clause); Engel v. Vital, 370 U.S. 421, 430, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962) ("[n]either the fact that the prayer may be denominally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause"). In this regard, the defendants argument as it relates to the elementary Bible class is no different than their previous challenge to the plaintiff's standing on the intercom prayer claim. In ruling on that issue, this court held that "[p]ermitting students to absent themselves from broadcasts or

classroom prayer which they find offensive does not cure the Establishment Clause problem and can be a destructive approach." Herdahl v. Pontotoc County Sch. Dist., 887 F. Supp. 902, 911 (N.D. Miss. 1995) (cited with approval in Ingebretsen v. Jackson Pub. Sch. Dist., __F.3d__, 1996 WL 205, *3 (5th Cir. Jan. 10, 1996)). The defendants' position, albeit couched in a new factual scenario, is no more valid now.

Turning to the specific arguments of the defendants in this case, it is their position that the plaintiff lacks standing because she has alleged no direct injury to herself or to her children beyond a generalized grievance based on her status as a taxpayer. The defendants claim that the plaintiff's children have not taken any of the Bible classes, do not plan to take the class in the future, and, citing deposition testimony, have not been harmed, injured, or affected in any way by such classes.

The defendants' argument notwithstanding, the above cited cases indicate that status as a resident taxpayer coupled with that of a parent of a child who attends the public school in which a practice is challenged under the Establishment Clause, has sufficed to confer standing on those individuals. McCollum; Zorach; Crockett; Doe. Other cases support this analysis. See Ford v. Manuel, 629 F. Supp. 771 (N.D. Ohio 1985) (allowing challenge to public school's renting of school property to religious group for religious instruction before and after school hours by parents of

students not participating in program); Wiley v. Franklin, 468 F. Supp. 133 (E.D. Tenn. 1979) (allowing challenge to privately funded elective Bible class by parents of some children not enrolled in course); Smith v. Smith, 523 F.2d 121 (4th Cir. 1975) (allowing challenge made by parents of children enrolled in school that released certain students for religious instruction in nearby trailer), cert. denied, 423 U.S. 1073 (1976); Vaughn v. Reed, 313 F. Supp. 431 (W.D. Va. 1970) (allowing challenge by parents of children to teaching the Bible in class even though the school allowed excusal of children whose parents did not consent); but see Roberts v. Madigan, 921 F.2d 1047 (10th Cir. 1990) (parents of students not enrolled in class at the time the suit was filed were not directly affected by the school's actions and therefore lacked standing to sue), cert. denied, 505 U.S. 1218 (1992). The court finds that Mrs. Herdahl in the instant case has, however, alleged more than this minimum requirement.

Not only has the plaintiff alleged a direct economic injury to herself through the allocation of public funds to religious organizations (e.g., free use of classroom space, bookshelves, etc., as well as providing funds for the purchase of books, supplies, and other materials), she has also alleged injury to her children. Her elementary age children are forced to get up in front of their classmates and leave their regular classroom

during the Bible class period. This practice, the plaintiff claims, subjects her children to harassment and ridicule and pressures them to conform to the majority's will. This is exactly the type of "special burdens" placed on impressionable schoolchildren that creates a legal right to seek redress. Valley Forge, 454 U.S. at 486 n.22. Furthermore, the lack of genuine alternative instruction demonstrates the superficial nature of the defendants' arguments that the plaintiff's children are not affected by the District's practices.

With regard to the high school Bible class, the defendants continually press their contention that Kevin Engle is in no way affected by it as represented by his deposition testimony. Although the defendants make much about the admission of Engle on this issue, his responses to other questioning belies the defendants' narrow reliance. In particular, the court notes that at the conclusion of over two hours of deposing sixteen-year-old Engle, the defendants asked one last question: "Has anyone forced you to attend any kind of Bible class?" Engle's response is instructive and revealing: "No, but it's there. It is constantly there."

The court concludes that based on the foregoing, the plaintiff has standing to pursue her challenge to the constitutionality of the Bible class offered at the Center.

An order will issue accordingly.

THIS, the _____ day of February, 1996.

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NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE